



Due Diligence Obligations of Officers

1 Who is an officer?

The WHS Act adopts the definition of an officer from section 9 of the *Corporations Act 2001* (Cth). Consequently, an officer, for the purpose of the WHS Act means:

- a director or secretary of the corporation
- a person:
 - who makes, or participates in making decisions that affect the whole or a substantial part, of the business of the corporation, or
 - who has the capacity to affect significantly the corporation's financial standing, or
 - in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the persons professional capacity or their business relationship with the directors or the corporation)
- a receiver, or receiver and manager, of the property of the corporation
- an administrator of the corporation
- an administrator of a deed of company arrangement executed by the corporation
- a liquidator of the corporation.

Pursuant to the WHS Act a partner is considered a PCBU. Consequently, the WHS Act excludes a partner in a partnership from being an officer of a PCBU. This is to avoid the partner being liable both as an officer and as a PCBU.

Aside from obvious positions such as director or company secretary, whether a person working in an organisation is an officer for the purposes of the WHS Act will largely depend on the facts and circumstances of each case. Safe Work Australia has published an Interpretive Guideline to assist in understanding the definition of officer.

2 What does due diligence mean in theory and in practice?

Under the WHS Act, an officer must exercise due diligence to ensure that the PCBU complies with its obligations under the WHS Act. The WHS Act defines due diligence, though the definition is not exhaustive.

Outlined below is a table setting out some of the elements relevant to due diligence, taken from the WHS Act and some sample guidance regarding specific steps that can be taken to assist in demonstrating due diligence (taken from the Safe Work Australia's Interpretive Guideline and WorkCover NSW guidance material²). The sample guidance in the table below is derived from information made available by Safe Work Australia and WorkCover NSW.

There is currently no guidance on how courts will interpret the due diligence obligations under the WHS Act.

The WHS Act makes it clear that the list of elements mentioned in the WHS Act is not exhaustive and is provided by way of guidance only. Officers will need to be proactive in devising ways of exercising due diligence which are relevant to their organisation and their position within that organisation.

² Source: Safe Work Australia, Interpretive Guideline- Model Work Health and Safety Act, The Health and Safety Duty of an Officer under Section 27 (current as at April 2012) and WorkCover NSW, <http://www.workcover.nsw.gov.au/newlegislation2012/Directorsandofficers/Pages/Duediligence.aspx> (current as at April 2012)

Element identified in WHS Act	Sample Guidance ³
Acquire and keep up-to-date knowledge of WHS matters.	<p>For example, what the WHS Act requires and the strategies and processes for elimination or minimisation of hazards and risks, so far as is reasonably practicable.</p> <p>May be fulfilled by:</p> <p>Officer participation in training, information sessions and/or conferences on WHS.</p> <p>Accessing industry specific WHS information such as information from industry associations.</p>
Gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations.	<p>Advice from a suitably qualified person may be required to gain a general understanding of the hazards and risks associated with the operations of the business or undertaking.</p> <p>May be fulfilled by:</p> <p>Undertaking regular inspections of the workplace and consulting with workers about WHS hazards and risks.</p>
Ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to WHS from work carried out as part of the conduct of the business or undertaking.	<p>This requires an understanding of what is needed for WHS, making decisions about procedures and resources and ensuring that they are used.</p> <p>May be fulfilled by:</p> <p>Checking the PCBU is providing an effective governance structure and WHS management system.</p> <p>Scrutiny and oversight to ensure allocation of resources to WHS matters (e.g. safe plant, maintenance and training).</p>
Ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information.	<p>This should include the reporting of incidents and emerging hazards and risks, identifying if any further action is required to eliminate or minimise the hazards or risks so far as is reasonably practicable and ensuring steps are taken by the PCBU to take reasonably practicable steps.</p> <p>May be fulfilled by:</p> <p>Checking the PCBU implements reporting systems to ensure communication of WHS matters, action and monitoring of remedial actions.</p>

³ Source: Safe Work Australia, *Interpretive Guideline- Model Work Health and Safety Act, The Health and Safety Duty of an Officer under Section 27 (current as at April 2012)* and WorkCover NSW, <http://www.workcover.nsw.gov.au/newlegislation2012/Directorsandofficers/Pages/Duediligence.aspx> (current as at April 2012)

Element identified in WHS Act	Sample Guidance ³
<p>Ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the WHS Act.</p>	<p>The WHS Act itself includes examples of the types of processes expected under this element of due diligence. Processes for:</p> <ul style="list-style-type: none"> ■ reporting notifiable incidents ■ consulting with workers ■ ensuring compliance with notices issued under the WHS Act ■ ensuring the provision of training and instruction to workers about WHS, and ■ ensuring that HSRs receive their entitlements to training. <p>May be fulfilled by:</p> <p>Checking the PCBU implements the processes identified above.</p> <p>Other examples include that the PCBU complies with licensing and registration obligations, union right of entry requirements and the duty to consult, co-operate and co-ordinate activities with other duty-holders.</p>
<p>Verify the provision and use of the resources and processes referred to above</p>	<p>This makes it clear that 'ensure' means active verification, for example through inspection or auditing processes, that the resources and processes are in place and are being used.</p> <p>Verification can occur through effective board reporting on WHS issues and auditing WHS arrangements.</p>

3 Reasonable steps

The WHS Act defines due diligence as including the taking of reasonable steps to carry out the elements listed in the table. What is reasonable will depend on the individual's circumstances. The Safe Work Australia Interpretive Guideline on duties of officers suggests that whether an officer took reasonable steps will depend on the officer's role and influence within the organisation.

Some officers may have more direct 'hands on' knowledge and others may be forced to rely on information provided by others.

Where the officer is relying on information provided by others, taking 'reasonable steps' will not require the officer to gain first hand knowledge but will, instead, require the officer to be able to demonstrate the reasonableness of that reliance (e.g. by showing that the officer relied upon a person the officer knew to be suitably skilled and having the requisite experience on the issue).

4 Demonstrating due diligence

The exercise of due diligence is the individual obligation of each officer within a PCBU. This means each individual officer should consider how they will demonstrate their compliance with the due diligence requirements.

Significant penalties apply for failing to exercise due diligence. The maximum penalties for a breach of the duty to exercise due diligence by an 'officer' is:

- Category 1 offence (recklessness) - \$600,000 and/or five years imprisonment
- Category 2 offence - \$300,000
- Category 3 offence - \$100,000.

The purpose of the document is to provide guidance on relevant provisions of the *Work Health and Safety Act 2011* (NSW) (WHS Act) and *Work Health and Safety Regulation 2011* (NSW) (WHS Regulation). This document should be read in conjunction with those laws. It does not constitute nor should it be relied on for the purposes of legal advice.